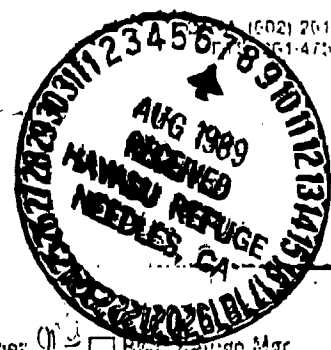


SOLICITOR'S OPINION OF AUGUST 3, 1989



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
PHOENIX FIELD OFFICE
L'AIGLON COURTS
505 NORTH 2ND STREET, SUITE 150
PHOENIX, ARIZONA 85004



FWS.PX.5100

August 3, 1989

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|---|--|
| <input type="checkbox"/> Refuge Manager | <input type="checkbox"/> Bldg. Refuge Mgr. |
| <input checked="" type="checkbox"/> Primary Asst. | <input type="checkbox"/> Clerk |
| <input type="checkbox"/> Asst. Ref. Mgr. | <input type="checkbox"/> Maint. |

Memorandum

To: Refuge Supervisor, AZ/NM, U.S. Fish and Wildlife Service, Albuquerque

From: Field Solicitor, Phoenix

Subject: Jurisdiction Claimed by the Chomehuevi Indian Tribe on Lands of the Havasu National Wildlife Refuge

This is in response to your prior request concerning the above-referenced claim of the Chemehuevi Indian Tribe (Tribe) to certain lands now within the boundaries of the Havasu National Wildlife Refuge (Refuge). Our legal analysis of this matter has taken longer than expected and this delay is regretted.

Conclusion

The question presented is whether certain former Chemehuevi Reservation lands which are now riparian to Lake Havasu and included within the Refuge (hereinafter "Subject Land") remain under the jurisdiction of the Tribe. We conclude that the Subject Land (from approximately Catfish Bay in the south to Blankenship Bend in the north then east to the Arizona-California border in the middle of the Colorado River) was part of a taking authorized by the Act of July 8, 1940 (54 Stat. 744). Once withdrawn for Reclamation purposes under the 1940 Act, the Subject Land was included within the Havasu National Wildlife Refuge established by Executive Order No. 8647 on January 25, 1941.

Certain riparian lands immediately south of the Subject Land taken under the 1940 Act were in fact returned to tribal jurisdiction under a Secretarial Order dated November 1, 1974 (modified May 12, 1988). Because the lands returned were located south of Catfish Bay, the Tribe has no continuing jurisdiction over the Subject Land. Moreover, even if it is assumed that some residual jurisdiction over the Subject Land remained with the Tribe under the 1940 taking, such jurisdiction was clearly extinguished by the Executive Order establishing the Refuge. See Discussion.

Discussion

Boundaries of the Chemehuevi Reservation. The Secretary of the Interior, by Order dated February 2, 1907 (Exhibit A), withdrew for the Chemehuevi Band of Mission Indians, the following described lands:

Fractional townships 4 N., R. 25 E., T. 4 N.,
R. 26 E., T. 5 N., 26 E., 6 N., 25 E., the E.
1/2 of T. 5 N., R. 24 E., and Secs. 25, 26, 35
and 36, T. 6 N., R. 24 E., S. B. M.

The above described lands were generally adjacent to the Colorado River on the California side with the Colorado River as the eastern boundary.

The Chemehuevis are but one of the Indian Tribes or Bands addressed in the Secretary's 1907 Order. This order was also made subject to (a) certain prior Reclamation withdrawals (dated July 2, 1902, August 22, 1902, and September 6, 1903); and (b) such other rights or valid claims as were established prior to the date of the 1907 Order.

Authority. The 1907 withdrawal was made pursuant to the Act of January 12, 1891 (26 Stat. 712). Exhibit B. This Act basically authorized the establishment of reservations for the various bands or villages of the Mission Indians of California. The reservations were to be established on vacant, otherwise unappropriated public land following the recommendations of a Board of Commissioners.

The 1891 Act was subsequently amended by the Act of March 1, 1907 (34 Stat. 1022) (Exhibit C) to authorize the Secretary to select, set apart, and cause to be patented to the various Mission Indian Bands such necessary reservation lands as were not previously provided by the Commissioners under the 1891 Act.

Certain questions have been raised over the years as to the process by which the withdrawal for the Chemehuevi Band was made (especially with respect to whether a Secretarial patent as contemplated was ever issued). However, a curative statute enacted in 1927 effectively removed remaining uncertainties as to the valid status of the reservation. See section 4, Act of March 3, 1927 (44 Stat. 1347), as amended (25 U.S.C. 398d):

Changes in the boundaries of reservations created by Executive Order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress. [Emphasis added]

Acquisition of Chemehuevi Lands for Parker Dam and Reservoir. The Act of July 8, 1940 (54 Stat. 744) provided for the acquisition of certain lands of the Chemehuevi and Fort Mojave Indian Tribes by the United States in connection with the Parker Dam and Reservoir Project. This project had been previously authorized by the Act of August 30, 1935 (49 Stat. 1935).¹

The 1940 Act followed a 1939 determination by the Solicitor that the Chemehuevi Indians were entitled to payment for certain lands to be flooded by the Parker Reservoir (Lake Havasu). See 57 I.D. 87, December 15, 1939. Solicitor Margold's Opinion concluded that the 1907 Department Order which withdrew lands from settlement and entry for the use and benefit of the Chemehuevi Indians was in confirmation of long-established use and occupancy rights.² Consequently, Reclamation withdrawal orders dated July 2, 1902, August 22, 1902, and September 6, 1903, which included in part the lands withdrawn for the Chemehuevi Band, were held to not extinguish the Band's rights to the land nor deprive them of their right to compensation for the full value of the lands to be flooded in connection with the Dam.

Solicitor Margold also concluded in his 1939 Opinion that the Metropolitan Water District (MWD), for whose benefit the Parker Dam was being constructed, was the entity required to pay compensation for the taking pursuant to a contract between the United States and the MWD dated February 10, 1933.

Taking Authorized by 1940 Statute. With this background, the 1940 statute provided for the acquisition of the following Indian lands in connection with the Parker Dam Project:

¹ The project had a somewhat checkered history prior to this point. It was originally authorized by the Act of June 18, 1932 (47 Stat. 324) (Exhibit D). Implementation was to be pursuant to a 1933 contract between the Secretary and the Metropolitan Water District of Southern California (MWD) whereby the United States agreed to build and operate the Parker Dam with funds provided by MWD. The validity of this contract was successfully challenged in United States v. Arizona, 295 U.S. 174 (1935) wherein the Court ruled that in executing the contract, the Secretary had not complied with section 9 of the Act of March 3, 1899 (33 U.S.C. 401). This statute forbids the construction of any dam in a navigable river unless consented to by the Congress.

² According to Solicitor Margold, the Chemehuevi Reservation included "a deep low valley [made] by the Colorado River [which] has been occupied from time immemorial" by the Tribe. See 57 I.D. 87, 89 (1939). The Chemehuevis received a settlement in the amount of \$996,834.81 for the taking of their ancestral lands pursuant to Indian Claims Commission Docket No. 351 (Final Judgment entered January 18, 1965).

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That, in aid of the construction of the Parker Dam Project, authorized by the Act of August 30, 1935 (49 Stat. 1028), there is hereby granted to the United States, its successors and assigns, subject to the provisions of this Act, all the right, title and interest of the Indians in and to the tribal and allotted lands of the Fort Mohave Indian Reservation in Arizona and the Chemehuevi Reservation in California as may be designated by the Secretary of the Interior.

Sec. 2. The Secretary of the Interior shall determine the amount of money to be paid to the Indians as just and equitable compensation for the rights granted under section 1 hereof. Such amount of money shall be paid to the Secretary of the Interior by the Metropolitan Water District of Southern California, a public corporation of the State of California, in accordance with the terms of a contract made and entered into on February 10, 1933, between the United States of America, acting through the Secretary of the Interior, and the Metropolitan Water District of Southern California. In the case of tribal lands, the amount due to the appropriate Tribe shall be deposited by the said Secretary in the Treasury of the United States, pursuant to the provisions of the Act of May 17, 1926 (44 Stat. 560), as amended. The amounts due individual allottees, their heirs, or devisees shall be deposited by the said Secretary to the credit of the Colorado River Indian Agency, or such other officer as shall be designated by the Secretary, for the credit on the books of the said agency to the accounts of the individual Indians concerned.

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Sec. 4. The Secretary of the Interior is hereby authorized to perform any and all acts and to prescribe such regulations as may be deemed appropriate to carry out the provisions of this Act. [Emphasis added]

Pursuant to the above statute, Acting Secretary Wirtz subsequently determined on October 9, 1940, the compensation to be paid to the Chemehuevi Tribe for the taking of certain lands up to the 465-

foot contour as necessary for the Parker Dam and Reservoir Project. See Exhibit E, copy of October 9, 1940, determination by Acting Secretary Wirtz. The actual designation of lands to be taken in connection with the above-referenced project was not made until November 25, 1941.

The Chemehuevi lands taken pursuant to the 1940 Act amounted to some 7716.14 acres. Of this total, tribal lands amounted to 7136.53 acres whereas allotted lands constituted 639.59 acres. Payment was made by the MWD on February 18, 1942 in the amount of \$107,000, plus \$1,069 for improvements.

Lands included within this 465-foot taking line basically ran from the ordinary high water mark of the Colorado River on the California side to the top of the escarpment which marked the beginning of the mesa on which the remainder of the reservation was situated. The net taking was approximately 19.7 percent of the overall reservation as established in 1907. It is within these river-bottom lands that the most productive areas of the reservation had been located.

With no remaining river frontage (in fact, the nearest portion of the reservation was more than one-half mile away from the River), the Tribe was left with approximately 28,000 acres of mesa lands consisting primarily of desert scrub vegetation. Such lands were (and are) generally considered to be not productive without extensive irrigation development.

Establishment of Havasu National Wildlife Refuge. On January 25, 1941, the Havasu National Wildlife Refuge was established by Executive Order No. 8647 (Exhibit F) consisting of approximately 37,370 acres in Mohave and Yuma Counties, Arizona, and in San Bernadino County, California. The subject refuge also specifically included:

. . .all lands hereafter acquired by the United States within such areas, including tribal and allotted Indian lands in which complete interests may hereafter be acquired by the United States pursuant to the act of July 8, 1940 . . .

The Executive Order establishing the refuge was in fact referencing lands within the Fort Mohave as well as Chemehuevi Reservations which were subsequently acquired for the Parker Dam and Reservoir Project. Of the 21 plus miles of shoreline lands taken from the Tribes under the 1940 statute, this Executive Order addressed only the northern five and one-half miles. These lands effectively ceased to be part of the reservations with the receipt of payment from the MWD on February 19, 1942. As of that date,

the Subject Land (which consists of former Chemehuevi river bottom land) became a part of the Havasu National Wildlife Refuge subject to a flowage easement in favor of Reclamation for Lake Havasu.

There have been numerous changes in the applicable land descriptions for the Refuge from its establishment in 1941. See Exhibit G, copy of Executive and Public Land Orders from 1941 through 1989, describing applicable changes in Refuge boundaries.

Riparian Claims of the Tribe. Following the taking authorized by the 1940 statute, the major substantive change in the Tribe's landholdings occurred on November 1, 1974, when the Secretary issued an order, copy enclosed as Exhibit H, which resulted in the return to the Tribe of that portion of the lands taken for Lake Havasu between slightly north of Catfish Bay in the north (sec. 18, T. 5 N., R. 24 E., SBB & M; and Beaver Point in the south, sec. 33, T. 4 N., R. 26 E., SBB & M).

The November 1, 1974 Order was subsequently amended on May 12, 1988 (see Exhibit H, Amendment) to permit the construction of buildings within a defined area of tribal riparian lands restored under the 1974 Order which were subject to periodic inundation. Specifically, the amendment authorized the Bureau of Indian Affairs to permit certain development activities (including the construction or installation of buildings for human habitation) within the formerly excluded area (300-feet of Lake Havasu) provided that such development was limited to the area between 34 degrees, 27 minutes, 40 seconds, and 34 degrees, 28 minutes, 10 seconds, north latitude. This amendment did not impact on any of the Subject Land.

The 1974 Secretarial Order was based on a Solicitor's Opinion dated August 15, 1974 (Exhibit J) which concluded that the Secretarial power under the Act of July 9, 1940 to designate Indian land to be taken for the Parker Dam and Reservoir Project was a continuing power rather than one which terminated with the original designation for the project in 1941.

The Solicitor's Opinion was rendered in response to two developments. First, the fact that Lake Havasu, the reservoir behind Parker Dam, did not flood all of the lands encompassed by

3 The November 1, 1974 Order corrected an earlier Order dated August 15, 1974. See Exhibit I. The primary difference between the two orders is that the August Order designates the north and south boundaries of the area to be returned to the tribe to a projected point on the 440-foot elevation (minimum pool level) and the November Order puts the boundary at the 450-foot elevation (operational water level). The November 1, 1974 Order references the August 15, 1974 Order and is thus assumed to take priority.

the 1941 Secretarial designation. The Solicitor reasoned that the 1940 Act provided authority for the Secretary to amend his previous designation of lands necessary without returning to Congress. See the authorization in the 1940 Act for the taking of "...all the right, title and interest of the Indians in and to the tribal and allotted lands of the Chemehuevi Reservation in California". There was no limitation provided in such Act on the Secretary's authority to designate tribal lands beyond the requirement that the lands designated be necessary "...in aid of the construction of the Parker Dam Project".

Therefore, the Secretary could, under the Solicitor's view, review the lands taken under the 1940 Act and, if it is determined that they are not necessary, restore tribal jurisdiction. The Solicitor found support for this approach in the legislative history for the 1940 Act wherein Congress appeared to contemplate only the taking of such tribal lands as were actually flooded by the new lake.

Second, the lack of any shoreline access for the Chemehuevi Reservation made tribal economic development difficult if not impossible. There was some evidence that for substantial periods since the 1941 Secretarial designation, only one Chemehuevi family had been living on the reservation. Lack of economic development opportunities was deemed in the Solicitor's 1974 Opinion to have frustrated congressional intent in authorizing the withdrawal of lands for the Chemehuevi Band.

Claims of the Tribe. As attorney for the Tribe, Mr. Les Marston has stated that the "...Tribe still retains jurisdiction over persons within the wildlife refuge". See Marston Letter dated March 7, 1988, Exhibit K. His conclusion appears to be based on an incomplete reading of the Solicitor's Opinion⁴ referenced hereinabove especially the following statement:

...just as the original designation [by the Secretary on November 25, 1941 pursuant to the Act of July 8, 1940] affected only title to land within the Chemehuevi Reservation and did not change the Reservation's boundaries, see United States v. Celestine, 215 U.S. 278, 285 (1909), so too the redesignation [the opinion

⁴ In his letter dated January 28, 1988 (Exhibit L), Mr. Marston incorrectly indicated that the passage below specifically referenced the 1941 Executive Order establishing the Refuge as not changing the "reservation's boundaries". Such is not the case. In fact, the Solicitor's Opinion only referenced the 1940 Secretarial designation of lands to be taken for the Parker Dam and Reservoir Project as not changing the "reservation's boundaries".

addressed whether the Secretary could redesignate for the benefit of the Tribe lands taken for Reclamation purposes pursuant to the Secretary's November 25, 1941 designation] would work no boundary change; it would merely confirm equitable title in the Chemehuevis to the lands in question.

The 1940 Act authorized the taking of "all the right, title and interest" of Chemehuevi lands designated by the Secretary of the Interior as necessary for the Parker Dam and Reservoir Project. Compensation was paid for this taking. There is no indication in the October 9, 1940, determination of compensation that the taking of anything other than a full fee was contemplated. See Exhibit E.

We agree with the well-established principle cited in the 1939 Opinion that infringements on Indian property rights should be minimized wherever possible. See e.g., Mattz v. Arnett, 412 U.S. 481 (1973); and United States v. Santa Fe Pacific R. R., 314 U.S. 339 (1941). At the same time, that does not mean there was any residue of tribal jurisdiction left over the Subject Land after the taking authorized by the 1940 Act. Arguably, that jurisdiction was extinguished, by analogy to general principles of Federal eminent domain, upon payment for the taking by the MWD in February 1942.

Under the approach suggested, what happened under the 1974 Secretarial Order was a restoration of tribal jurisdiction over certain riparian land south of the Subject Land. Restoration of jurisdiction does not mean that the Tribe held any legal title between the time of compensation for the taking (February 1942) and the 1974 Secretarial Order. Instead, it merely means that the Secretary was, pursuant to 25 U.S.C. 465 acquiring, by way of an intragovernmental transfer, an "interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians". Since the Tribe held no legal title in the restored lands between 1942 and 1974, there are even fewer grounds to conclude that it has legal title in the Subject Land because such land has not been made subject to a Secretarial restoration order.

Even if it is argued that the United States took only an flowage easement⁵ under the 1940 Act for the Parker Dam and Reservoir Project pursuant to Secretarial designation, and that the Tribe

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Admittedly a difficult proposition to argue in the context of an authorizing statute and compensation letter dated October 9, 1940 which references the taking of "all right, title and interest" of the Indians. But see Solicitor's Opinion, August 15, 1974, Exhibit J.

retained some residual jurisdiction, the Subject Land received an additional designation pursuant to Executive Order No. 8647 when such lands were included within the Refuge.

The President's authority to designate by Executive Order lands for inclusion in a national wildlife refuge was prescribed by Congress pursuant to the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497). Since the 1941 Executive Order was properly issued, it must be regarded "as a public act of which all courts of the United States are bound to take notice and to which they must give effect". 77 Am. Jur.2d United States sec. 46.

The designation under Executive Order No. 8647 effectively extinguished any residual jurisdiction the Tribe may have had within the Subject Land. Even if it is further argued that the Secretary has the delegated authority pursuant to Executive Order No. 10355 (May 26, 1952) to change the designation of lands made in the 1941 Order for inclusion in the Refuge, the Secretary would still have had to make a redesignation of the Subject Land. Careful review of the record indicates that no such redesignation has been made.

The Boundary Issue. It is well established that the creation of a townsite within the exterior boundaries of a reservation does not mean that the town is no longer part of the Reservation. See, e.g., City of New York v. United States, 454 F.2d 121 (8th Cir. 1972); also Buster v. Wright, 135 F.947 (8th Cir. 1905). Yet this principle does not support tribal jurisdiction over the Subject Land. The reason why is that in the former case, the conflict is Tribal/Federal v. State/Municipal, and pursuant to the Supremacy Clause, the Tribal/Federal interest will almost invariably supercede. By contrast, in the case of attempted tribal jurisdiction over the Subject Land, there is no conflict since, under any conceivable "narrow" construction of the Act of July 8, 1940, tribal jurisdiction has already been extinguished. For the narrow construction test in this context, see Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982).

Lands Restored to Tribal Jurisdiction under the 1974 Secretarial Order. Neither the Secretarial Order dated August 15, 1974 or the

Secretarial Order dated November 1, 1974, impacted lands within and a part of the Havasu Refuge.⁶ Instead, both orders merely provided that pursuant to the 1940 Act, the Tribe had full equitable title to all lands riparian to Lake Havasu between the following northern southern boundaries:

A. In the north: From a point in Section 18 T. 5 N., R. 25 E., located as follows: Beginning at the SE Corner of said Section 18 S89°22'W 711 ft.; thence N00°21'E a distance of 1304 ft.; thence N51°20'W a distance of 1697 ft.; thence N01°16'E a distance of 1130 ft. From said point the North Boundary is established on a line S74°08'E to the operating pool level of the west bank of Lake Havasu (elevation 450 feet m.s.l.).

⁶ Indeed, it would seem that the Tribe admitted as such at least with respect to the August 15, 1974 Secretarial Order. See Tribal Resolution Chem-R-74-22 wherein it is stated that (a) the Tribe claims "that the eastern boundary of the Chemehuevi Indian Reservation is the shoreline of Havasu Lake created by the construction of Parker Dam"; (b) the order of the Secretary dated August 19, 1974 "has confirmed the claims of the Chemehuevi Indian Tribe except with respect to a portion of those areas presently designated as part of the Havasu National Wildlife Refuge, subject to the reservation of certain rights" [emphasis added]; and (c) "the Chemehuevi Tribal Council is willing to accept the resolution of such claims ordered by the Secretary of the Interior so long as the land reserved for the Havasu National Wildlife Refuge is used only for such purposes".

⁷ By contrast, the description of the northern boundary of the area to be restored to the Tribe in the August 15, 1974 Secretarial Order read as follows:

From a point in Section 18, T. 5 N., R. 25 E., located as follows: Beginning at the SE Corner of said Section 18 due west 711 ft.; thence N00°21'E a distance of 1304 ft.; thence N51°20'W a distance of 1967 ft.; thence N01°16'E a distance of 1130 ft. From said point the North Boundary is established on a line S74°08'E to the minimum pool elevation of the west bank of Lake Havasu.


As can be noted, the differences between the two descriptions are de minimis.

B. In the south: From point on the south line of Sec. 33, T. 4 N., R. 26 E. which is 3156' N69°51'E a distance of 350' more or less to the operating pool level of the west bank of Lake Havasu (elcvation 450 feet m.s.l.).

Riparian lands within these north and south parameters did not include any lands classified as being within the Refuge. Exhibit M is a copy of a land description prepared by BLM--Cadasteral Survey, Arizona State Office, of the Subject Land. These lands are not subject to the jurisdiction of the Chemehuevi Tribe.

Additional Comments or Questions. If you have any comments or questions on the matters set forth in this memorandum, please contact this office.

Fritz L. Goreham
Field Solicitor


Richard L. Greenfield
For the Field Solicitor

Attachments

cc: /Refuge Manager, Havasu NWR, Attention: Jim Good
(w/attachments)
Area Director, Phoenix Area Office, BIA (w/attachments)

8 Again by contrast, the description of the southern boundary in the area to be restored to the Tribe in the August 15, 1974 Secretarial Order read as follows:

B. In the south: From a point on the south line of Sec. 33, T. 4 N., R. 26 E. which is 3156' N89°51'E a distance of 350' more as less the minimum pool elevation of the west bank of Lake Havasu.

As can be noted, the differences between the two descriptions are de minimis.